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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1003

[Docket No. EOIR 183; A.G. Order No. 3534-2015]

RIN 1125-AA79

Expanding the Size of the Board of Immigration Appeals

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This rule amends the Department of Justice regulations relating to the organization of the Board of Immigration Appeals (Board) by adding two Board member positions, thereby expanding the Board to 17 members.

DATES: Effective date: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comment date: Written comments must be submitted on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until midnight eastern time at the end of that day.

ADDRESSES: Please submit written comments to Jean King, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 20530. To ensure proper handling, please reference RIN No. 1125-AA79 or EOIR docket No. 183 on your correspondence. You may submit comments electronically or view an electronic version of this interim rule at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Jean King, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 20530, telephone (703) 305-0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at www.regulations.gov. Such information includes personally identifiable information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personally identifiable information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONALLY IDENTIFIABLE INFORMATION” in the first paragraph of your comment. You must also locate all the personally identifiable information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much

confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Personally identifiable information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the "For Further Information Contact" paragraph.

II. Background

The Executive Office for Immigration Review (EOIR) administers the Nation's immigration court system. Generally, cases commence before an immigration judge when the Department of Homeland Security (DHS) files a charging document against an alien with the immigration court. *See* 8 CFR 1003.14(a). EOIR primarily decides whether foreign-born individuals who are charged by DHS with violating immigration law pursuant to the Immigration and Nationality Act (INA) should be ordered removed from the United States, or should be granted relief or protection from removal and be permitted to remain in the United States. EOIR's Office of the Chief Immigration Judge administers these adjudications in immigration courts nationwide.

Decisions of the immigration judges are subject to review by EOIR's appellate body, the Board of Immigration Appeals (Board), which currently comprises 15 permanent Board members. The Board is the highest administrative tribunal for interpreting and applying U.S. immigration law. The Board's decisions can be reviewed by the Attorney General, as provided in 8 CFR 1003.1(g) and (h). Decisions of the Board and the Attorney General are subject to judicial review.

III. Expansion of Number of Board Members

EOIR's mission is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws. This includes the initial adjudication of aliens' cases in immigration courts nationwide, as well as appellate review by the Board when appeals are timely filed. In order to more efficiently accomplish EOIR's commitment to promptly decide a large volume of cases, as well as review a large quantity of appeals of those cases, this rule amends the Department's regulations relating to the organization of the Board by adding two Board member positions, thereby expanding the Board from 15 to 17 members.¹ This rule revises the third sentence of 8 CFR 1003.1(a)(1), leaving the remainder of paragraph (a)(1) unchanged.

Expanding the number of Board members is necessary at this time for two primary reasons. First, EOIR is currently managing the largest caseload the immigration court system has ever seen. At the end of FY 2014, there were 418,861 total cases pending at the immigration courts, marking an increase of 62,831 cases pending above those at the end of FY 2013. *See* 2014 EOIR Stat. Y.B. W1.² This total increase included an increase in the number of pending cases involving detained aliens. The efficient and timely adjudication of cases of detained aliens is the highest priority for EOIR and requires additional resources to handle the increased caseload. As the caseload in the immigration courts increases, the Department anticipates that the corresponding caseload at the Board will also expand.

¹ The Department last expanded the number of Board members – from 11 to 15 members – on December 7, 2006, when it published in the Federal Register an interim rule amending 8 CFR 1003.1. *See* 71 FR 70855 (Dec. 7, 2006). On June 16, 2008, the Department published a final rule adopting, without change, the interim rule. *See* 73 FR 33875 (Jun. 16, 2008).

² EOIR's FY2014 Statistical Year Book, prepared by EOIR's Office of Planning, Analysis, and Technology, is available at <http://www.justice.gov/eoir/statspub/fy14syb.pdf>.

Second, after the hiring freeze was lifted in fiscal year (FY) 2014, the Department processed and identified for hire 25 immigration judge candidates. Also in FY 2014, the Department advertised for and is now in the process of selecting a substantial number of additional immigration judges. The Department expects that, as these new immigration judges enter on duty, the number of decisions rendered nationwide by immigration judges will increase and, in turn, the number of appeals filed with the Board will also increase.

The current caseload at the Board is burdensome and may become overwhelming in the future for a Board of 15 members. At the same time, if the Board becomes too large, it may have difficulty fulfilling its responsibility of providing coherent direction with respect to the immigration laws. In particular, because the Board currently issues precedent decisions only with the approval of a majority of permanent Board members, a substantial increase in Board members may make the process of issuing such decisions more difficult.

Keeping in mind the goal of maintaining cohesion and the ability to reach consensus, but recognizing the challenges the Board faces in light of its current and anticipated increased caseload, the Department has determined that two members should be added to the Board at this time. These changes are necessary to maintain an efficient system of appellate adjudication in light of the increasing caseload.

IV. Public Comments

This rule is exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date because, as an internal delegation of authority, it relates to a matter of agency organization, procedure, or practice. *See* 5 U.S.C. 553(b). The Department is nonetheless promulgating this rule as an interim rule, providing the public with opportunity for post-promulgation comment before the Department issues a final rule on these matters.

V. Regulatory Requirements

A. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), “[w]henver an agency is required by section 553 of [the RFA], or any other law, to publish general notice of proposed rulemaking for any proposed rule . . . the agency shall prepare and make available for public comment an initial regulatory flexibility analysis.” 5 U.S.C. 603(a). Such analysis is not required when a rule is exempt from notice and comment rulemaking under 5 U.S.C. 553(b). Because this is a rule of internal agency organization and therefore is exempt from notice and comment rulemaking, no RFA analysis under 5 U.S.C. 603 is required for this rule.

B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

D. Executive Orders 12866 and 13563 – Regulatory Planning and Review

The Department has determined that this rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866, “Regulatory Planning and Review,” and the Office

of Management and Budget has concurred in this determination. Nevertheless, the Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order 13563, “Improving Regulation and Regulatory Review.” Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including consideration of potential economic, environmental, public health, and safety effects, distributive impacts, and equity. The benefits of this interim rule include providing the Department with an appropriate means of responding to the increased number of appeals to the Board. The public will benefit from the expansion of the number of Board members because such expansion will help EOIR better accomplish its mission of adjudicating cases in a timely manner. The Department does not foresee any burdens to the public or the Department.

E. Executive Order 13132 – Federalism

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 – Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this interim rule because there are no new or revised recordkeeping or reporting requirements.

H. Congressional Review Act

This action pertains to agency management and personnel and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (CRA) (Subtitle E of the Small Business Regulatory Enforcement Fairness Act (SBREFA)), 5 U.S.C. 804(3). Therefore, the reports to Congress and the Government Accountability Office specified by 5 U.S.C. 801 are not required.

List of Subjects in 8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

Accordingly, for the reasons stated in the preamble, the Attorney General is amending part 1003 of chapter V of title 8 of the Code of Federal Regulations as follows:

PART 1003 – EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for Part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub.L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub.L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub.L. 106–554, 114 Stat. 2763A–326 to –328.

2. Amend § 1003.1 by revising the third sentence of paragraph (a)(1) to read as follows:

' 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

(a)(1) * * * The Board shall consist of 17 members.* * *

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May 28, 2015

Date

Loretta E. Lynch
Attorney General

[FR Doc. 2015-13459 Filed: 6/2/2015 08:45 am; Publication Date: 6/3/2015]